

28662

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-214979

DATE: June 29, 1984

MATTER OF: Richard A. Schwartz Associates, Inc.

DIGEST:

1. Protests alleging deficiencies in an invitation for bids apparent prior to bid opening must be filed with either the contracting agency or GAO before the time set for opening bids in order to be timely.
2. Where bidders who submitted identical low bids remain equally eligible for award after the agency's consideration of all proper factors, the tie may be resolved by drawing lots to determine the successful bidder.

Richard A. Schwartz Associates, Inc. protests the proposed award of a contract for foreign document translation services to Fischer Translation Service under invitation for bids (IFB) No. PS-ADM-84-227, issued as a small business set-aside by the Nuclear Regulatory Commission (NRC). Both Schwartz and Fischer submitted equal low bids for the Germanic languages portion of the procurement, and Fischer was determined the low bidder by drawing lots.

Schwartz complains that: (1) the use of a line count rather than a word count in the IFB for the estimated amount of text to be translated places bidders in the detrimental position of being required to offer fixed prices for only estimated quantities of work; (2) NRC has furnished no documentation demonstrating the existence of a tie bid and the propriety of the lottery process; (3) NRC did not consider the relative competence of the bidders in resolving the tie; and (4) Fischer does not have a Department of Defense facility clearance to handle classified documents. We dismiss the protest in part and deny it in part.

029300

Background

The IFB was issued on February 10, 1984, soliciting offers to furnish services for the translation of foreign language nuclear research publications and associated technology reports into English. The IFB was divided into four separate language categories (i.e., Germanic, Romance, Afro-Asian, and Cyrillic) to allow for maximum competition. Section B.15 of the IFB provided for the making of multiple awards, so that a firm could bid on one category, or any combination of language categories. Fixed prices were requested on a per line basis, with evaluation based on the estimated number of lines of text in various categories to be translated. Bids were opened on March 23, with Schwartz and Fischer submitting equal low bids for the translation of Germanic languages:

	<u>Schwartz</u>	<u>Fischer</u>
German		
3-8 day delivery	\$ 810.00	\$ 900.00
9-22 day delivery	2,970.00	3,300.00
23-35 day delivery	1,620.00	1,800.00
Swedish		
3-8 day delivery	\$ 540.00	\$ 450.00
9-22 day delivery	1,980.00	1,650.00
23-35 day delivery	1,080.00	900.00
Total	\$9,000.00	\$9,000.00

In accordance with the Federal Procurement Regulations (FPR), 41 C.F.R. § 1-2.407-6 (1983), NRC resolved the tie between Schwartz and Fischer by drawing lots.

Timeliness

Schwartz alleges that the IFB was flawed because it required bidders to offer prices on the basis of estimated line counts of text to be translated, rather than on the basis of estimated word counts, the latter apparently being the standard industry practice. According to Schwartz, such a format does not present a sufficient firm requirement to allow the submission of fixed prices.

Our Bid Protest Procedures, however, require that protests alleging deficiencies in an IFB apparent prior to bid opening must be filed with either the contracting agency or this Office before the time set for bids to be opened in order to be considered. 4 C.F.R. § 21.2(b)(1) (1984). Here, although there is no doubt but that Schwartz knew of NRC's use of the line count format as soon as it received its copy of the IFB, the firm did not file its protest with this Office until April 17, some 3 weeks after bids were opened. Therefore, the issue is clearly untimely and will not be considered. Brod-Dugan Company, B-212731, Nov. 28, 1983, 83-2 CPD ¶ 619.

Resolution of Tie Bids

Schwartz terms the situation resulting in identical low bids as "highly improbable." The firm asserts that it has never seen documentation showing either the existence of the tie or the propriety of resolving the tie by drawing lots.

As we have already set forth, however, the copy of the bid abstract sheet furnished by NRC clearly shows that Schwartz and Fischer submitted identical bids of \$9,000.00 for the translation of Germanic language documents, further confirmed by an examination of copies of the firms' respective bid packages.

Further, to resolve tie bids, FPR, § 1-2.407-6(a) provides for award to be made in the following order of priority to: (1) a small business concern that is also a labor surplus area concern, (2) a small business concern, or (3) a firm other than small which is a labor surplus area concern. Here, both Schwartz and Fischer were small business concerns but not labor surplus area concerns and thus remained equally eligible for award.

FPR, § 1-2.407-6(b) provides that lots shall be drawn when bidders remain equally eligible after the agency applies the priorities established in subsection (a). If time permits, the bidders shall be given the opportunity to be present at the drawing, which shall be witnessed in any event by at least three persons, whose names and addresses shall be placed in the contract file.

Here, NRC relates that it asked both Schwartz and Fischer on several occasions if they wished to attend the drawing. Neither firm accepted the invitation. The lottery was held on April 12, and resulted in Fischer's

name being drawn. Roth firms were advised of the result by telephone the next day. NRC has furnished this Office with the names and addresses of the three persons who witnessed the drawing. On the basis of these facts, we conclude that NRC resolved the tie in full accordance with the regulations, and any implications to the contrary on Schwartz's part are without merit. See Alderson Reporting Company, Inc.; Ace-Federal Reporters, Inc., B-205552.2, Feb. 12, 1982, 82-1 CPD # 128.

Relative Competence of the Bidders

Regarding NRC's resolution of the tie, Schwartz contends that the use of such a lottery was not in the government's best interest, where the agency could have chosen Schwartz over Fischer on the basis of the firm's allegedly greater technical competence and experience. Apart from the fact that Schwartz's contention is merely self-serving opinion, we emphasize that the relative competence of bidders is simply not a factor which an agency may properly consider under FPP § 1-2.407-6 when resolving a tie bid. Pandy International, Ltd.; Perklav Air Services, 53 Comp. Gen. 466 (1974), 74-1 CPD # 11, aff'd on reconsideration, R-179880, March 4, 1974, 74-1 CPD # 115. So long as the winning bidder is found to be responsible, award must be made to it.

Security Clearance

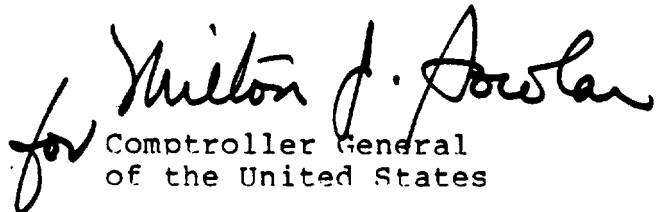
Schwartz also alleges that the IFB required bidders to have a Department of Defense facility clearance (DIS) in order that the eventual awardee be able to handle classified documents in performing the contract. Schwartz notes that it has such a clearance, but questions whether Fischer has one as well. In virtually the same vein as the issue of relative competence, Schwartz implies that NRC should have taken this into consideration when resolving the tie.

The IFB did not require bidders to have a DIS, but rather informed all bidders at section B.23 that performance under any resulting contract would require access to classified material so that the contractor's personnel and facility would need the appropriate NRC clearances. Additionally, the IFB provided instructions for the submission of personnel security questionnaire packages and a contractor facility plan following the award of a contract. The agency states that it intends to conduct the necessary investigations before granting personnel and facility clearances, and points out that, since Schwartz and Fischer do not

hold NRC clearances, either firm would be investigated, if awarded the contract, despite having a DIS from the Department of Defense.

In any event, whether a prospective contractor has or has the ability to obtain any necessary security clearances is a matter of responsibility because a security clearance relates to a firm's ability to perform. See International Business Investments, Inc.; Career Consultants, Inc., 60 Comp. Gen. 275 (1981), 81-1 CPD ¶ 125. Finally, for the same reasons stated previously, Fisher's lack of a DIS would not be an appropriate consideration for resolving a tie bid.

The protest is dismissed in part and denied in part.

for 
Comptroller General
of the United States